

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

93-89
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In re Applications of

AURIO A. MATOS

**LLOYD SANTIAGO-SANTOS AND
 LOURDES RODRIGUES-BONET**

For a Construction Permit for a
 New FM Station on Channel 293A at
 Culebra, Puerto Rico

) MM DOCKET NO. 93-89 **FEB 15 1994**

) File No. BPH-911115MP
) **FEDERAL COMMUNICATIONS COMMISSION**
) **OFFICE OF THE SECRETARY**

) File No. BPH-911115MP

To: The Review Board

MASS MEDIA BUREAU'S COMMENTS ON
PETITION FOR LEAVE TO AMEND

1. On February 7, 1994, Aurio A. Matos ("Matos") filed a Petition for Leave to Amend his application to specify a new transmitter site. The Mass Media Bureau submits the following comments.

2. Matos originally proposed to mount his antenna on an existing tower located on a National Wildlife Refuge. The National Wildlife Refuge is under the jurisdiction of the U.S. Fish and Wildlife Service, U.S. Department of Interior. The tower is owned by Carlos J. Colon-Venture ("Colon"), licensee of Station WSAN(FM), Vieques, Puerto Rico. The WSAN(FM) antenna is presently located on the Colon tower pursuant to a Special Use Permit issued by the U.S. Fish and Wildlife Service. Colon's Special Use Permit prohibits him from subleasing space on his tower absent permission from the U.S Fish and Wildlife Service.

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3. Upon release of the Initial Decision of Administrative Law Judge Joseph P. Gonzalez, 8 FCC Rcd 7920 (ALJ, 1993), which granted Matos' application for a construction permit, Matos formally requested a Special Use Permit from the U.S. Fish and Wildlife Service to mount his antenna on the Colon tower.¹ Subsequently, by letter, dated December 13, 1993, the U.S. Fish and Wildlife Service informed Matos that it had made a "definitive decision not to grant [Matos] a Special Use Permit for use of this tower, not even on a temporary basis."

4. Matos states that although he could have appealed the decision of the U.S. Fish and Wildlife Service, he "elected instead to amend his application to specify a new site." Petition, at p. 3. Matos also maintains that his amended proposal should be accepted because the need for the amendment was not foreseeable, Matos acted with due diligence in locating a new site, acceptance of the amendment will not require the addition of new issues, the hearing process will not be disrupted, and Matos' competing applicant will not be prejudiced.

5. Based on an analysis of the amendment by its technical staff, the Bureau has determined that Matos' proposal complies with all applicable technical requirements. Nevertheless, the Bureau submits that the amendment should not be accepted because Matos has failed to satisfy Section 73.3522 of the Commission's Rules.

6. Matos does not state in his Petition that the new proposal is "necessitated" by any event, such as the loss of his original transmitter site. Indeed, Matos carefully avoids making any reference to the fact that he no longer has reasonable assurance of the

¹ The U.S. Fish and Wildlife Service had previously informed Matos that it would not consider a request for a Special Use Permit until such time that Matos was granted an FCC authorization.

availability of the Colon tower. The reason is that Matos is caught in a "Catch 22" situation. Matos has maintained in his February 7, 1994, Opposition to [the Bureau's] Motion to Reopen the Record and Enlarge Issues that the U.S. Fish and Wildlife Service decision was a mere "preliminary determination" which Matos did not have to report to the Commission pursuant to Section 1.65 of the Commission's Rules. If Matos were to acknowledge in his instant Petition that his proposed amendment was necessitated by the U.S. Fish and Wildlife Service decision denying him a Special Use Permit, he would be unable to simultaneously claim that the same decision was too insignificant to be reportable.

7. Matos cannot have it both ways. If the instant amendment is necessitated by the loss of Matos' original transmitter site (the more logical scenario, in the Bureau's view), then that loss was a significant event which Matos should have reported to the Commission pursuant to Section 1.65. Conversely, if Matos did not have to report the U.S. Fish and Wildlife Service decision to the Commission because the decision did not deprive Matos of his reasonable assurance, then the instant amendment is merely being filed voluntarily, and, as such, cannot be accepted.

8. Notwithstanding the foregoing, there remain other, independent bases for not accepting Matos' amendment. The Bureau notes that Matos has not yet received approval from Federal Aviation Administration ("FAA") to construct his proposed new supporting tower. In the absence of such approval, acceptance of Matos' amendment would require the addition of an air hazard issue. Addition of an issue represents a failure to satisfy the traditional good cause criteria. Erwin O'Connor Broadcasting Co., 22 FCC 2d 140 (Rev. Bd. 1970).

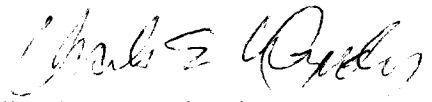
9. Additionally, there is a reasonable basis for questioning whether the U.S. Fish

and Wildlife Service decision was in fact unforeseeable, as Matos claims. Matos maintains that the U.S. Fish and Wildlife Service's negative response to his request for a Special Use Permit was not foreseeable because there was already a tower and operating FM station at the site in question. Petition, p. 5-6. However, the U.S. Fish and Wildlife Service decision was not a total surprise to Matos by any means. Matos neglects to state in his Petition that he was aware long before the December 13, 1993, decision, that the U.S. Fish and Wildlife Service had been attempting to reduce the use of, if not eliminate entirely, the Colon tower because of the adverse impact on endangered plant and turtle species. See, Matos' February 7, 1994, Opposition to Motion to Reopen the Record and Enlarge Issues, at Ex. B.


10. The Bureau submits that if the amendment is deemed to have been filed voluntarily or the U.S. Fish and Wildlife Service decision was foreseeable, then the amendment should be denied as inconsistent with of Section 73.3522(b). If the Board finds that the only impediment is Matos' lack of FAA approval, the amendment should be held in

abeyance until such time that a no hazard determination is issued.

Respectfully submitted,
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February 15, 1994

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 15th day of February 1994, sent by regular First Class United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Comments on Petition for Leave to Amend" to:

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